Supreme Court, U.S.
FILED
MAR 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

85-1531

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

MARCUS GUMZ,

Petitioner,

v.

DOUGLAS MORRISSETTE and
LAWRENCE CLOUTIER,

Respondents.

# BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRONSON C. LA FOLLETTE
Attorney General

JOHN R. SWEENEY
Assistant Attorney General

Counsel of Record

Attorneys for Respondent

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7342

15pp

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS.....3

ARGUMENT.....5

PETITIONER HAS FAILED TO DEMONSTRATE THAT THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.....5

**I. No Conflict Exists Among The Circuits On The Excessive Force Issue.....5**

A. Conway I & II.....5

B. Petitioner misinterprets the opinion of the Seventh Circuit Court of Appeals in this case.....6

**II. Petitioner's Challenge To The Application Of Hudson v. Palmer Is Without Merit.....9**

CONCLUSION.....11

CASES CITED

Bonner v. Coughlin,
517 F.2d 1311 (7th Cir. 1975),
modified en banc,
545 F.2d 565 (1976),
cert. denied, 435 U.S.
932 (1978).....10-11

Cerbone v. Conway,
No. 84-1947, cert. granted,
54 U.S.L.W. 3492
(Jan. 27, 1986),.....6

Conway v. Village of Mount Kisco,
750 F.2d 205 (2nd Cir. 1984)....5, 6

Conway v. Village of Mount Kisco,
758 F.2d 46 (2nd Cir. 1985).....5, 6

Duncan v. Nelson,
466 F.2d 939 (7th Cir.),
cert. denied,
409 U.S. 894 (1972).....8

Hudson v. Palmer,
104 S. Ct. 3194 (1984)..3, 9, 10, 11

Parratt v. Taylor,
451 U.S. 527 (1981).....10, 11

Williamson Co. Regional Planning v.
Hamilton Bank,
105 S. Ct. 3108 (1985).....10

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment.....10

OTHER AUTHORITIES

42 U.S.C. § 1983.....2, 11

S.C.R. 17.1(c).....6

No. _____

---

**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1985

---

MARCUS GUMZ,

Petitioner,

v.

DOUGLAS MORRISSETTE and
LAWRENCE CLOUTIER,

Respondents.

---

# BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

## STATEMENT OF THE CASE

This is a civil rights action in which the petitioner alleged that eleven defendants, including officials and employes of the Wisconsin Department of Natural Resources ("DNR"), violated his constitutional right to due process

pursuant to 42 U.S.C. § 1983 (App. 1). The district court entered judgment on the jury verdict which found liability against only two individuals on a single issue; the jury found that two defendants had used excessive force in arresting the plaintiff (App. 1, 6).

All post-trial motions were denied by the court, including the plaintiff's motion to amend the judgment to include liability for the seizure of the plaintiff's dragline (App. 1-2, 6-7).

The Seventh Circuit Court of Appeals reversed the judgment of the district court on excessive force in the arrest but affirmed the district court's denial of liability for the seizure of the dragline. Costs were awarded to the defendants by both the appellate and district courts.

The petitioner advances two arguments which he suggests support granting a Writ of Certiorari.

1. The Seventh Circuit Court of Appeals erred in reversing the district court's judgment finding that two defendants violated the plaintiff's constitutional rights by using excessive force in arresting the plaintiff.

2. The Seventh Circuit Court of Appeals erred in its application of Hudson v. Palmer, 104 S. Ct. 3194 (1984).

## STATEMENT OF THE FACTS

The Court of Appeals has already set forth a rather concise statement of the facts relevant to the legal issues in question (App. 1-7). Petitioner's brief reiterates those facts for approximately two paragraphs but then radically deviates and detours therefrom into the

highway of speculation, argument and narration of facts unsupported by and in conflict with the record in both the district and the appellate court.

Rather than point out the numerous misstatements, argument and speculation in petitioner's statement of facts, the respondents simply reiterate those facts discussed by the appellate court in its opinion (App. 1-7).[1/]

---

1/ Besides misleading the court by his misstatement of the facts, the petitioner's Statement of the Case and issues presented are seriously deficient and inaccurate because they are founded on facts not supported by the record below (see App. 1-2).

## ARGUMENT

PETITIONER HAS FAILED TO DEMONSTRATE THAT THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.

### I. No Conflict Exists Among The Circuits On The Excessive Force Issue.

#### A. Conway I & II

The petitioner suggests that the portion of the decision of the Seventh Circuit Court of Appeals related to the use of excessive force conflicts with two decisions from the second circuit, Conway v. Village of Mount Kisco, 750 F.2d 205 (2nd Cir. 1984) and Conway v. Village of Mount Kisco, 758 F.2d 46 (2nd Cir. 1985), which have been accepted for review by this Court.

As this Court is aware, the two Conway cases are malicious prosecution cases and the underlying facts cannot in any sense be compared with the portion of this case related to the alleged use of

excessive force. See Cerbone v. Conway, No. 84-1947, cert. granted, 54 U.S.L.W. 3492 (Jan. 27, 1986).

Thus, the Conway cases as discussed by petitioner do not form the basis for granting the writ for certiorari pursuant to S.C.R. 17.1(c).

B. Petitioner misinterprets the opinion of the Seventh Circuit Court of Appeals in this case.

The petitioner suggests that the Seventh Circuit "has required as an essential element of a substantive due process claim proof of severe injury" (Petitioner's Brief at 15); further,"that emotional distress injury, in the absence of physical injuries, absent extraordinary circumstances is insufficient to constitute a constitutional violation as a matter of law (Petitioner's Brief at

16). This, very frankly, is not so and the Seventh Circuit took the time to say so.

Petitioner apparently would like the Court to ignore the Seventh Circuit's very explicit language to the contrary:

> This Court is not holding that some type of bodily injury is an absolute requirement to § 1983 liability based on an excessive force claim. But the ultimate question here is, after all, whether the use of force was so egregious as to be constitutionally excessive, and the presence of some physical injury is certainly relevant to that determination.
>
> ... Although defendants here must have known that their operation would upset and anger the plaintiff, the facts of this case as determined by the judge and jury do not implicate the type of "brutal and demeaning" attack on the psyche

> of Marcus Gumz which would be actionable under § 1983.[4] 2/

(App. 12.)

Petitioner's reading of the opinion of the court of appeals is in error.

---

2/ In footnote 4, the Seventh Circuit reiterated its statement that actual physical violence is not a sine qua non of § 1983 liability based on an excessive force claim.

> Duncan v. Nelson, 466 F.2d 939, 945 (7th Cir. 1972), certiorari denied, 409 U.S. 894, 93 S. Ct. 116, 175, 34 L. Ed. 2d 152, which held that "physical violence need [not] be present to produce the coercion necessary to constitute an involuntary confession cognizable under § 1983," is not contrary to our holding today. While the presence or threat of physical violence is indeed of limited relevance to determining whether psychological coercion rendered a confession involuntary, the absence of such violence or of any resulting physical injury is most relevant to the inquiry of whether the use of force by state officials is so excessive as to shock the conscience of the court.

## II. Petitioner's Challenge To The Application Of Hudson v. Palmer Is Without Merit.

Petitioner contends that the Court of Appeals in this case for the first time extended this Court's ruling in Hudson v. Palmer, 104 S. Ct. 3194, and by doing so decided an important question of federal law which should be settled by this Court (Petitioner's Brief, p. 34).

Initially it must be reiterated that the petitioner's effort to create an issue for appeal to this Court is clouded by his misstatements of the facts.

Secondly, it is clear that petitioner neither understands the decision of the Court of Appeals in this case nor the constitutional notion of a "taking" as defined by this Court.

The Court of Appeals held "[I]t is also clear that the deprivation [the

seizure of the dragline] was the result of a random and unauthorized act of a state official" (App. 15). And, because the Court found the State of Wisconsin did provide the plaintiff with a meaningful post-deprivation remedy to redress the taking of his property, no violation of the Fourteenth Amendment rights occurred (App. 15-16).

Furthermore, this Court has repeatedly held that there is no constitutional deprivation until such time as the state fails to provide an adequate post-deprivation remedy for the loss, Williamson Co. Regional Planning v. Hamilton Bank, 105 S. Ct. 3108, 3121 (1985); Hudson v. Palmer, 104 S. Ct. at 3204; Parratt v. Taylor, 451 U.S. 527, 541-542 (1981); Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975) modified en

banc, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932 (1978).

The petitioner's attempt to distinguish the Court of Appeals' application of Hudson v. Palmer is without any authority.

In this case, there was no taking in the constitutional sense and the petitioner had a remedy under state law for whatever relief he might have sought. Besides the fact that he did not pursue these remedies even though they were clearly adequate, there is no constitutional requirement that state remedies must provide all the relief which might have been available under 42 U.S.C. § 1983. Parratt v. Taylor, 451 U.S. at 544. Petitioner's argument to the contrary is without merit.

## CONCLUSION

This petition does not present either a conflict among the circuits or an important federal question which must be decided by this Court. Thus, the petition should be denied.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General

JOHN R. SWEENEY
Assistant Attorney General

Counsel of Record

Attorneys for Respondent

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7342